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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 03 2005

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Marie Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in a field related to her occupation from the University of Delhi. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens

> seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, cytogenetics, and that the proposed benefits of her work, linking chromosome abnormalities with the resulting condition (such as infertility and cancer), would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

As stated above, the petitioner obtained her Ph.D. from the University of New Delhi in 1989. While her evaluation from Foreign Credential Evaluations, Inc. indicates that the degree was awarded in the field of anthropology, her degree indicates that her thesis investigated the ecogenetics of congenital craniofacial malformations, an area of research consistent with her current work. The petitioner performed postdoctoral research at that institution until 1991. In that year, the petitioner spent two months as a research fellow at the University of Pittsburgh before accepting a position as a visiting scientist at the University of Zurich for two years. From 1994 to 1995, the petitioner was a visiting scientist at the Swiss Federal Institute of Technology. The petitioner returned to India in 1996 to work as the Associate Director of Research at Symbolic Systems, Inc. From 1998 to 2000, the petitioner worked as a research scientist at the [redacted] Center. At the time of filing, the petitioner was working as a research scientist at Case Western Reserve University in the laboratory [redacted]

Dr. Hassold asserts that his laboratory uses cytogenetics to study chromosome abnormalities that lead to spontaneous abortions and male infertility. He explains that the laboratory's technique of combining

immunofluorescence with fluorescence to investigate recombination in the human male "is being used to characterize the distribution of crossing-over in the human male, and to investigate the role of recombination abnormalities in male infertility." The paragraph with this information, however, does not mention the petitioner and it is not clear that [redacted]s claiming that the petitioner has developed a technique that has been adopted for use at other laboratories investigating crossing-over and male infertility.

Regarding the petitioner specifically, [redacted]serts that she has analyzed chromosome preparations and DNA from males suffering from Azoospermia and Oligozoospermia. [redacted] concludes that the petitioner's research "can be utilized in the detection and management of those cases of male infertility which are currently unexplained as male factor infertility." [redacted] does not indicate that fertility clinics have expressed an interest in applying the petitioner's work.

[redacted]discusses the importance of cytogenetics research. The intrinsic merit of this field has been recognized above. [redacted]asserts that the petitioner has presented the research she has been doing at Case Western Reserve University and that she "has been able to contribute tremendously to a field that has become increasingly relevant to society." He does not, however, identify any specific contributions and explain how they have influenced the field. Rather, he notes the importance of her training and years of experience. Ten years of experience in the field is one of the requirements for aliens of exceptional ability, a classification that normally requires a labor certification. We cannot conclude that meeting one criterion, or even the requisite three criteria, warrants a waiver of that requirement. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold.

On appeal, counsel notes that the director acknowledged a shortage of technicians trained in the petitioner's area of research and concludes that a shortage in an area of intrinsic merit where a "probability" of national benefit exists is sufficient to establish eligibility. Whether or not the director made a determination relating to the existence of a shortage in the petitioner's field, the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221. The petitioner must demonstrate a past record that justifies projections of future benefit to the national interest. *Id.* at 219.

[redacted] an assistant professor at Case Western Reserve University, asserts that the petitioner also analyzed samples of spontaneously aborted fetuses to determine the origin of trisomy 16, a common chromosomal abnormality that prevents fetuses from surviving past the first trimester. [redacted] asserts that this research is important, but does not identify any specific result obtained by the petitioner in performing this work. [redacted]asserts that his laboratory discovered a correlate between trisomies 16 and 21 but does not credit the petitioner with this work and does not explain its significance. In response to the director's request for additional documentation, the petitioner asserts that, based on this work, "this protocol is now routinely performed throughout the United States as symptoms warrant." The record lacks letters from professional obstetric associations confirming that obstetricians use the petitioner's "protocol" to test for genetic abnormalities after miscarriages in order to counsel their patients regarding the risk for future pregnancies.

[redacted]Director of the Laboratory of Epithelial Cancer Biology at the Memorial Sloan Kettering Cancer Center, discusses the petitioner's work at that center. [redacted]explains that the petitioner successfully applied Comparative Genomic Hybridization and Spectral Karyotyping to her study of non-Hodgkin's Lymphoma, achieving "excellent results." [redacted]explains that "very few researchers have

been able to master the sensitive conditions and protocols that are required in order to obtain reliable results." According [redacted] the petitioner used these techniques to identify "novel breakpoints, translocations, and sites of amplification in B- and T-cell Lymphomas." [redacted] concludes that these results "can be further utilized by other scientists to identify genes perturbed at these sites."

[redacted] former collaborator at the Memorial Sloan Kettering Cancer Center, provides similar information, focusing on the importance of Lymphoma research and the petitioner's skills in mastering the techniques used to analyze human chromosomes.

[redacted] assistant staff at the Cleveland Clinic Foundation, asserts, in response to the director's request for additional documentation, that the petitioner has been hired by that foundation to study the genetics of breast cancer. He further asserts that the petitioner's work with Lymphoma has been published and cited by top researchers.

[redacted] the petitioner's collaborator at the University of Zurich, asserts that the petitioner used the Polymerase Chain Reaction (PCR) molecular genetic technique to detect sex chromosomal aneuploidies. [redacted] sserts that this work was published and is clinically useful, but provides no examples of the influence of this work.

[redacted] the petitioner's former professor at the University of New Delhi, asserts that the petitioner's thesis is the only study on Asian Indian populations linking HLA antigens to craniofacial malformations such as cleft lips and palates. As noted by the petitioner in response to the director's request for additional documentation, this work was published and has been cited four times.

The petitioner also submitted letters from independent researchers, all of whom discuss the petitioner's skills with cytogenetic techniques. [redacted] a senior staff scientist at the National Institute of Allergy and Infectious Diseases (NIAID), asserts that the petitioner's protocols "are used and relied upon by both clinicians and researchers in infectious diseases, cancers, congenital conditions, liver diseases and others." [redacted] further asserts that protocols are routinely shared in the field without credit. On appeal, counsel asserts that the director should not have rejected [redacted] informed statements. [redacted] does not, however, assert that NIAID has adopted the petitioner's protocols or provide any examples of clinicians and researchers who have. Statements from clinicians and researchers who have actually adopted the petitioner's protocols would be more persuasive.

[redacted] a group leader at the Department of Molecular Pathology at Walter Reed Hospital, asserts that "development and validation of 'protocols' is not a work that is typically published in scientific journals, but is instead 'shared' by clinicians and researchers by direct contact and communication." Once again, however, [redacted] does not assert that Walter Reed uses the petitioner's protocols or provide any examples of clinicians and researchers who have. [redacted] further asserts that the petitioner "is enrolled in the Human Genetics Training Program and has just completed her Clinical Cytogenetics fellowship and is now board-eligible to take [the] ABMG certification examination in Clinical Cytogenetics."

In addition to the letters, the petitioner has submitted evidence of four published articles, including her thesis, and evidence of oral and poster presentations. The petitioner's thesis was published in 1991 and three independent research teams have cited it four times, two of which were after the date of filing. One independent research team cited the petitioner's 1998 article on myeloma. Finally, after the date of filing, six

research teams cited the petitioner's 2002 article on non-Hodgkin's Lymphoma. The director noted that most of the citations are in articles dated after the date of filing and concluded that without copies of the citing articles, "the degree of reliance" could not be determined.

On appeal, the petitioner submits the articles that cite her work. Counsel argues that the limited number of publications produced by the petitioner should not preclude eligibility. While we acknowledge that there are factors in the medical field that can limit a researcher's ability to publish, such as intellectual property rights, we cannot conclude that a mere explanation for a minimal publication history is sufficient. Rather, the petitioner must meet her burden with other types of evidence, such as evidence of patents and an interest in purchasing or licensing the technology. In the petitioner's case, given the claims made by the petitioner, it can be expected that the petitioner would be able to produce letters from clinicians and researchers applying her protocols. The record does not include such letters.

On appeal, the petitioner submitted evidence that her 2002 article on non-Hodgkin's Lymphoma has now been cited 10 times. One article receiving moderate attention after the date of filing, in the absence of letters that more clearly identify specific contributions and examples of how those contributions are already influential in the field, is insufficient to establish a consistent track record of success as of the date of filing.

Finally, on appeal, counsel asserts that the labor certification process is too lengthy. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223. Even if we were to accept that the labor certification process is somehow inapplicable to the petitioner's field, and counsel has not demonstrated that the national interest waiver was intended as a blanket waiver for all researchers, that finding is not by itself sufficient to warrant a waiver. *Id.* at 218, n.5.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.